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Supreme Court, U.S.
FILED
APR 22 2005
OFFICE OF THE CLERK

No. 04-1057

IN THE

Supreme Court of the United States

LORRAINE "JADE" MCKENZIE,

Petitioner,

v.

MARK BENTON,
In His Official Capacity as Sheriff of Natrona County,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Peter Young
SCHWARTZ, BON, WALKER
& STUDER, LLC
141 South Center
Casper, WY 82601
(307) 235-6681

Erik S. Jaffe
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th St., N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Respondent

April 22, 2005

QUESTION PRESENTED

Whether an Americans with Disabilities Act plaintiff denied employment for a job the essential functions of which involve inherent danger retains the burden of proving that she is a qualified individual by showing that she can perform those functions without posing a direct threat to herself or others.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES ii
RESPONDENT'S BRIEF IN OPPOSITION 1
STATEMENT 1
A. Legal Framework 2
B. Facts 3
ARGUMENT 7
I. THIS CASE IS A POOR VEHICLE IN WHICH TO ADDRESS THE QUESTION PRESENTED. 8
II. THE ALLEGED SPLIT IN THIS CASE IS OVERSTATED 11
III. THE DECISION BELOW IS ABSOLUTELY FAITHFUL TO THE ADA AND THIS COURT'S DECISIONS 18
CONCLUSION 22

TABLE OF AUTHORITIES

Pages

Cases

Branham v. *Snow*, 392 F.3d 896 (CA7 2004) 16, 17
Dadian v. *Village of Wilmette*, 269 F.3d 831 (CA7 2001) 17
EEOC v. *Amego, Inc.*, 110 F.3d 135 (CA1 1997) 11
Hargrave v. *Vermont*, 340 F.3d 27 (CA2 2003) 12, 13
Hutton v. *Elf Atochem N. America, Inc.*, 273 F.3d 884 (CA9 2001) 15, 16

Lovejoy-Wilson v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208 (CA2 2001) 13

Moses v. *American Nonwovens, Inc.*, 97 F.3d 446 (CA11 1996), *cert. denied*, 519 US 1118 (1997) 11, 12

Nunes v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243 (CA9 1999) 15

Rizzo v. *Children's World Learning Centers, Inc.*, 173 F.3d 254 (CA5 1999), *aff'd*, 213 F.3d 209 (CA5) (*en banc*), *cert. denied*, 531 U.S. 958 (2000) 14

Rizzo v. *Children's World Learning Centers, Inc.*, 213 F.3d 209 (CA5) (*en banc*), *cert. denied*, 531 U.S. 958 (2000) 14, 15, 22

School Bd. of Nassau Cty. v. *Arline*, 480 U.S. 273 (1987) 2, 18

The Monrosa v. *Carbon Black, Inc.*, 359 U.S. 180 (1959) 10

Waddell v. *Valley Forge Dental Assocs.*, 276 F.3d 1275 (CA11 2001), *cert. denied*, 535 U.S. 1096 (2002) 12

Statutes

42 U.S.C. § 12112 ..... 2, 3, 18, 19

42 U.S.C. § 12113 ..... passim

Rules

FED. R. CIV. PRO. 50 10

FED. R. CIV. PRO. 61 10

Other Authorities

H.R. Rep. No. 101-485 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445 3

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RESPONDENT'S BRIEF IN OPPOSITION

For the following reasons, Respondent respectfully suggests that the Petition for a Writ of Certiorari should be denied.

STATEMENT

This case involves the narrow issue, addressed by only a few courts, of whether an Americans with Disabilities Act ("ADA") plaintiff denied a job the essential functions of which entail inherent dangers to herself and others, bears the burden of proving that she is qualified for that job by showing that she will not pose a direct threat to herself and others in the performance of those essential functions.

Petitioner, a former deputy sheriff, voluntarily resigned from the Sheriff's Office after a series of violent, self-

destructive, and dangerous episodes brought on by a newly occurring mental illness. Petitioner subsequently was denied re-employment with the Sheriff's Office based on conduct showing that she posed a threat to herself and others in the inherently dangerous field of law enforcement. A jury agreed that Petitioner posed a direct threat, was therefore not a qualified individual for the job she sought, and returned a verdict for Respondent. The Tenth Circuit affirmed.

A. Legal Framework

The ADA provides that a covered employer may not "discriminate against a *qualified individual with a disability* because of the disability of such individual in regard to" hiring and other aspects of employment. 42 U.S.C. § 12112(a) (emphasis added). It is well-established that an ADA plaintiff bears the burden of proving that she is a qualified individual in order to bring a claim for discrimination in hiring. Pet. App. 28a (initial CA10 opinion reversing summary judgment) (citing multiple cases). The ADA defines the term "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, *can perform the essential functions* of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added). Such essential functions, in turn, can be defined, in part, by "qualification standards," which "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b); *see also School Bd. of Nassau Cty.* v. *Arline*, 480 U.S. 273, 287 n. 16 (1987) (Rehabilitation Act case stating that a "person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk").[1]

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[1] Rehabilitation Act cases generally are read in *pari materia* with ADA cases. That is particularly true in the context of the direct threat provision, which was intended to codify in the ADA the Rehabilitation Act standard

Insofar as a plaintiff cannot satisfy the relevant qualifications for a particular job, and thus would not be a "qualified individual" capable of establishing a hiring discrimination claim, she may still claim, under a different aspect of the ADA, that the use of the qualification standards themselves discriminates in that such standards "*screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities * * *." 42 U.S.C. § 12112(b)(6).

If a plaintiff successfully raises and establishes such an alternative discrimination claim, an employer may still defend the qualification standard itself on the grounds that it is job related and consistent with business necessity. *Id.* (excluding from the definition of discrimination the use of a qualification standard that "*is shown to be job-related for the position in question and is consistent with business necessity* ...."); *see also* 42 U.S.C. § 12113(a) ("It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards * * * [that screen out the disabled] has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter."). That "defense," however, goes to the *validity* of the qualification standard *vel non*; it does not relate to the *satisfaction* of a valid qualification standard, which remains an aspect of determining whether the plaintiff is a "qualified individual."

B. Facts

Prior to the events giving rise to this case, Petitioner McKenzie had been a deputy sheriff in the Natrona County Sheriff's Office for 10 years. In 1996, however, petitioner began to experience post-traumatic stress disorder ("PTSD") in connection with childhood sexual abuse by her father. Pet.

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set forth in the *Arline* case itself. *See* House Judiciary Comm. Report on the ADA, H.R. Rep. No. 101-485, pt. 3, at 34, 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 457, 468.

App. 3a. As a result, her conduct and behavior took a dramatic and dangerous turn for the worse. Pet. App. 3a-4a.

On August 15, 1996, Petitioner was found at the Memorial Garden Cemetery, in Casper, Wyoming firing her service revolver into the grave of her dead father and having overdosed on prescription medications. Pet. App. 3a; 4 Appellant's App. 525-26.[2] Petitioner had no idea how or why she ended up at the cemetery and admitted that she has no memory of driving to the cemetery or the events leading up to this episode. 3 Appellant's App. 306. Law enforcement officers dispatched to the scene described Petitioner as intoxicated and irrational and believed that she was a danger both to herself and to the public. 4 Appellant's App. 511-19. One of the officers testified at trial that Petitioner's discharge of a firearm was reckless and that driving in her condition would have constituted a DUI. 4 Appellant's App. 525-26 (testimony of Officer Hadlock). Following that event, Petitioner was admitted into Crestview Psychiatric Unit and placed on administrative leave. Appellee's App. 1108-1109. After seven days of intensive psychiatric treatment, petitioner was released from the psychiatric unit on condition that she participate in outpatient treatment and supervision. Appellee's App. 1105-07.

On August 27, 1996, Petitioner called the hospital demanding to speak with another patient and indicated that she intended to harm herself. Law enforcement officers dispatched to her apartment failed to find her but discovered a message indicating that plaintiff did not know the difference between reality and fantasy. 4 Appellant's App. 527-530. A search by the local authorities ensued. Petitioner was eventually located at Lookout Point on Casper Mountain. She had cut her wrist, was intoxicated, and could barely speak. Appel-

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[2] "__ Appellant's App." refers to the various volumes of the Appellant's Appendix in the Court of Appeals. "Appellee's. App." refers to the single volume of the Appellee's Appendix in the Court of Appeals.

lee's App. 1128-1129.[3] Petitioner was taken to the hospital. 4 Appellant's App. 534-35.

On September 18, 1996, Petitioner had to go to the hospital after hitting her hand against a wall in frustration and in a state of emotional distress. Appellee's App. 1130. She testified this was done out of anger and in a fit rage. *Id.*

On September 22, 1996 Petitioner was placed on a twenty-three hour emergency watch at Crestview due to suicidal thoughts and threats. Appellee's App. 1131.

On September 29, 1996, Petitioner once more had to go to the hospital after again hitting her hand against a wall in anger and rage. 4 Appellant's App. 1131.

The following day, Dr. Viray, Petitioner's psychiatrist, wrote a letter to then-Under-Sheriff Benton stating that Petitioner was unable to return to work and that her prognosis was poor. Dr. Viray specifically stated in that letter that Petitioner's return to her previous position may be hazardous to her and to the public and that further extensive evaluation is necessary. Appellee's App.1178. That letter was never withdrawn by Dr. Viray. Pet. App. 3a.

On October 1, 1996, Petitioner resigned from the Sheriff's Office, stating that she could not predict a return to work within a reasonable amount of time. 3 Appellant's App. 348.

On October 7, 1996 Petitioner was admitted to the emergency room following an apparent drug overdose. Appellee's App. 1141-49. The Police had found her locked in a bathroom; she was distraught, lethargic and barely conscious. The officer who brought her in testified that he considered Petitioner a threat and a danger to herself, and filled out paperwork to involuntarily commit her. 4 Appellant's App. 561-63 (testimony of Sgt. Walsh).

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[3] Casper Mountain Road to Lookout Point is a winding narrow mountain road that Petitioner had obviously driven on while intoxicated.

On October 21, 1996, Petitioner was asked by her counselors and psychiatrist to release all weapons she had in her possession to her friends. That request was made out of concern for her safety and the safety of others. 2 Appellant's App. 229. She complied with that request.

On November 20, 1996, Dr. Viray wrote a letter to the Natrona County Sheriff's Department stating that Petitioner was ready to return to work. Pet. App. 3a; Appellee's App. 1155. At trial, however, Dr. Viray essentially repudiated that letter, stating that she could not say whether Petitioner was capable to returning to work as a patrol officer or whether plaintiff posed a direct threat, presently, or at the time she sought re-employment. Appellee's App. 1178; Pet. App. 3a-4a. Instead, Dr. Viray testified that Petitioner's PTSD does not have a linear progression, but rather is an episodic/crisis type condition, where there peaks and valleys and that there is simply no way to identify when plaintiff will crash again or what may trigger another relapse. 3 Appellant's App. 431-32; Pet. App. 4a. Petitioner's licensed counselor, Darlene Bayu, similarly testified that although 69% of people with post traumatic stress syndrome recover fully, the balance of 31% do not, and hence she could not say whether Petitioner was a threat to herself or to fellow officers. 3 Appellant's App. 395.

On January 28, 1997, Petitioner phoned the Casper Police Department to report that her friend Jay Black (a suspected drug dealer), was suicidal and may have been involved in an altercation at her apartment. Officers reporting to the scene stated that they were concerned for their own and for Petitioner's welfare because of Petitioner and her friend were acting unpredictably. 4 Appellant's App. 561-63.

On July 24, 1998, Petitioner wrote a letter to one of her doctors saying that she still needed counseling but just could not afford it; admitting that she still had ongoing problems. Appellee's App. 1150.

The numerous objective facts and opinions supporting the proposition that Petitioner would pose a direct threat if she returned to law enforcement were amply detailed at trial. Indeed, each of the investigating officers involved in the various events explained how Petitioner's conduct and acts caused concern and fear for their own safety and for the safety of members of the public. Pet. App. 6a.

Also presented at trial was substantial and undisputed evidence that law enforcement is an unforgiving business involving serious risks, dangerous instrumentalities, and lethal weapons. Officers are required to make split-second decisions in times of crisis, both within the jail and out on the street. 4 Appellant's App. 610; Pet. App. 15a-16a. In fact, two expert witnesses presented at trial – Tom Walton, a police expert, and Dr. Wihera a psychological expert specializing in police conduct – testified that it was reasonable for the Sheriff's Office to rely on the objective evidence of Petitioner's dangerous behavior to determine that she was no longer qualified to be a deputy sheriff. 5 Appellant's App. 791; Pet. App. 5a-6a. Tom Walton was even more critical, stating that the Sheriff would have been derelict in his duties had he hired Petitioner back as a deputy because she posed a direct threat to herself, fellow officers, and members of the community because of her prior actions. 5 Appellant's App. 791.

Relying on this extensive evidence, the jury found that Petitioner did indeed pose a direct threat to herself and others and consequently was not qualified for the job she sought. The trial evidence on this issue was overwhelming and there was essentially no evidence to the contrary.

ARGUMENT

Certiorari should be denied. First, because the overwhelming evidence presented at trial on the issue of direct threat would lead to the same outcome regardless of which party bore the burden of proof, this case is a poor vehicle in

which to consider the question presented. Instead, this Court should await a vehicle in which the burden of proof may have credibly played a material role in the outcome.

Second, Petitioner substantially overstates any split implicated by this case. Only four courts of appeals have squarely considered the narrow question presented here: Who bears the burden of proof of direct threat where safety considerations are inherently bound up in the essential functions of the job and hence effectively merge with the issue of whether plaintiff is a "qualified individual." Three courts, including the Tenth Circuit below, place the burden of proof on the plaintiff. Only one court – the Seventh Circuit – has held otherwise in similar circumstances, and it did so in a manner that suggests a failure to fully consider how the rule might apply differently in the context of inherently dangerous jobs. One additional court allocated the burden to the defendant in the context of a hazardous job, but did not address the distinction raised here and the burden of proof was irrelevant to the outcome in any event. The other two circuits cited as part of the split in fact have only ruled in the context of non-hazardous jobs, and even the Tenth Circuit below would place the burden on the defendant where danger is not an inherent element of the job. Given the undeveloped and in fact uncertain nature of the alleged split, further percolation is warranted.

Third, the Tenth Circuit's allocation of the burden of proof to the plaintiff in this narrow category of cases was eminently correct and entirely faithful to this Court's decisions. There simply is no need for this Court to intervene and review the correct rule applied and result reached below.

I. THIS CASE IS A POOR VEHICLE IN WHICH TO ADDRESS THE QUESTION PRESENTED.

Regardless whether in some cases the burden of proof of direct threat might play a role in the outcome, in this case it is all but irrelevant. The evidence presented at trial regarding

Petitioner's hazardous behavior and the ongoing risks posed by her episodic disorder that could result in violent, irrational, and destructive incidents, combined with the absence of any evidence that she could safely resume her law enforcement duties, made the jury verdict inevitable. The facts show repeated incidents of violence, intoxication, irrationality, and lapses of awareness and control. The psychiatric testimony suggested that her PTSD was episodic, could readily recur at unpredictable times, and was not cured in a very substantial percentage of cases. The expert testimony from an experienced police supervisor and an experienced police psychologist suggested that it was perfectly reasonable to take Petitioner's behavior into account in deciding not to rehire her into law enforcement and indeed that it might be utterly reckless to hire her given the objective facts.[4] Even Petitioner's own doctors and counselors were unable to vouch for her ability to perform her job safely. And her treating psychiatrist, Dr. Viray, repudiated at trial the one piece of evidence – the ready-to-return-to-work letter – that enabled Petitioner to avoid summary judgment.[5]

In light of such evidence, the jury correctly found that Petitioner posed a direct threat to the safety of herself and others

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[4] There can be little doubt that if Petitioner had been rehired and then injured or killed somebody in a recurrence of her dangerous behavior, a lawsuit against the Sheriff's Office for gross negligence or recklessness would easily reach a jury based on the same evidence and testimony.

[5] The Tenth Circuit's initial reversal of summary judgment and finding of a genuine issue of fact regarding direct threat was based on a very different and leaner record. Pet. App. 24a-41a. In finding there to be a jury question on the issue the court observed that respondent did not full argue the appeal and that there was "no evidence suggesting in what way" Petitioner posed a threat given that she had been cleared by her doctor (referring to the return-to-work letter from Dr. Viray). Pet. App. 25a, 38a, 40a. But at trial Respondent presented voluminous evidence regarding the direct threat posed by Petitioner, and the key piece of evidence previously relied upon by the Tenth Circuit had been effectively repudiated by its author.

and thus was not qualified for a position with the Sheriff's Office. Indeed, no reasonable jury could have found otherwise under the applicable preponderance of the evidence standard. Given the substantial change in the record between the initial reversal of summary judgment and the jury verdict, Respondent would be entitled to summary judgment or judgment as a matter of law even under Petitioner's proposed shifting of the burden of proof.[6] Insofar as there may have been any error in the jury instruction, it was harmless error that did not affect the outcome of the case or the substantial rights of the parties, and did not undermine the substantial justice of the verdict. *See* FED. R. CIV. PRO. 61 (harmless error disregarded); *Cf. The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180, 184 (1959) (Court decides issues "in the context of meaningful litigation. * * *. Resolution here of the * * * [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.").

If this Court finds the question presented generally worthy of consideration at all, it would be better served by waiting for a case where the issue was meaningfully presented. If the issue is important and the purported split persists, there will be ample future vehicles in which a more balanced factual

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[6] In fact, Respondent moved for a directed verdict at the close of Petitioner's evidence and again at the close of all the evidence. The district court took the motions under advisement and sent the case to the jury. The resulting verdict rendered those motions moot, but had the jury somehow come out the other way Respondent would have had an overwhelming case for a renewed motion for post-verdict judgment as a matter of law. FED. R. CIV. PRO. 50(b). Indeed, Respondent's entitlement to judgment as a matter of law – regardless of who bears the burden of proof –is an alternative ground for affirming the judgment below, and thus illustrates why this case is a poor vehicle. Should this Court ultimately agree, after full briefing, that the evidence of direct threat was so one-sided that the burden of proof does not matter, it might never reach the question presented and hence would have placed an unnecessary burden on its valuable time and resources. It would be far better to wait for a vehicle that does not pose such a risk of collapsing on its facts.

record will give appropriate context to, and elucidate the potential consequences of, the allocation of the burden of proof regarding direct threat.

II. THE ALLEGED SPLIT IN THIS CASE IS OVERSTATED.

Despite Petitioner's efforts to portray a deep split, there are actually only a few courts that have squarely addressed the narrow question presented here.

Three courts of appeals place the burden on the plaintiff to demonstrate that she is qualified for an inherently dangerous job by proving that she will not pose a direct threat to herself or others. The Tenth Circuit in the case below clearly articulated this rule and observed that while proof that a plaintiff is a direct threat would be an affirmative defense in cases where such threat is *not* bound up in the essential job functions at issue, where it is so bound up in the qualifications for the job in the first place, the burden remains on the plaintiff to prove that she is a qualified individual. Pet. App. 18a-20a.

The First Circuit has likewise held that where the issue of direct threat and a plaintiff's qualifications for an inherently dangerous job overlap, the burden remains on the plaintiff to prove that she is otherwise qualified in that she could safely perform the inherently dangerous essential functions of the job. *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 144 (CA1 1997) (employee burden where essential job functions necessarily implicate safety). Both the First and Tenth Circuits limit their rule to the circumstances of essential job qualifications that inherently involve safety and in that narrow context apply the well-established rule that it is the employee's burden to prove that she is qualified for the job she seeks.

The Eleventh Circuit likewise places the burden of proof on the employee where the job in question involves inherent dangers and hence safety considerations are part of the qualifications for the job. *See Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (CA11 1996) (employee with epilepsy had burden of proving that he did not pose a direct threat

when working in precarious positions above, below, and next to extremely dangerous industrial machinery), *cert. denied*, 519 US 1118 (1997); *Waddell* v. *Valley Forge Dental Assocs.*, 276 F.3d 1275, 1280 (CA11 2001) (dental hygienist with HIV has burden of proving no direct threat where dental procedures involved inherent danger of blood exchange and open wounds), *cert. denied*, 535 U.S. 1096 (2002).[7]

Of the four circuits that Petitioner cites as placing the burden on the defendant to prove a direct threat, only one of those circuits has so held in the context of an inherently dangerous job and one other has done so where it had no bearing on the outcome and the inherent danger distinction at issue in this case was not squarely addressed. The other two circuits are not in conflict with the decision below at all.

The Second Circuit, for example, in *Hargrave* v. *Vermont*, 340 F.3d 27 (CA2 2003), addressed the issue in the quite different context of an ADA Title II claim involving the ability of a disabled person to enjoy the benefit of a durable power of attorney ("DPOA") for health care that specified a refusal to be involuntarily medicated. In that case the State never disputed the plaintiff's qualification to sign the DPOA when she was competent to do so, and the supposed danger posed by

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[7] Petitioner's attempt, at 9, to impute a stricter rule to the Eleventh Circuit that would apply regardless of whether safety was an essential element of the job qualifications is mistaken. The Eleventh Circuit's observation in *Moses*, 97 F.3d at 447, that the employee retains "at all times the burden of persuading the jury" on the direct threat issue was plainly a reference to the burden of proof remaining constant *within* that given case, not an announcement of a broader rule of law applicable to cases where the absence of a direct threat was *not* part of the essential qualifications for a job that involved no inherent dangers. There is no indication that the Eleventh Circuit would apply the same rule where the job in question was secretarial or otherwise non-hazardous. In any event, even assuming, *arguendo*, a broader rule in the Eleventh Circuit that would apply to non-hazardous jobs, the validity of that rule is not even raised by the question presented in this case and hence such an alleged discrepancy among the courts offers no reason to take *this* case presenting a far narrower question.

not forcing medication on the plaintiff if she later became incapacitated was identical to the danger that would exist for non-disabled persons who later became incapacitated. *Id.* at 32, 35, 37. Given that DPOAs were enforceable for others notwithstanding the identical dangers – indeed, in spite of such dangers, for that is the very point of pre-determining a refusal of medication – it was obvious that the safety or lack thereof of such medical directives was not an essential element or requirement of the benefit and hence did not bear on the plaintiff's *qualifications* for the benefit. That case is more akin to employment cases where safety is *not* an essential job requirement and hence cannot properly be viewed as in conflict with the decision below.

The Second Circuit's decision in *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (CA2 2001), likewise did not involve essential job requirements that inherently involved safety concerns. The job being sought in *Lovejoy-Wilson* was that of a convenience store manager and the disability in question was epilepsy. At no point was there any indication that the defendant claimed the job to be inherently dangerous or identified any essential elements of the job that plaintiff could not safely perform. Placing the burden on the defendant under those circumstances is understandable given that safety could not be said to be part of the job qualifications for such run-of-the-mill employment. Indeed, the Tenth Circuit's rule in the present case would lead to precisely the same result.[8]

The Fifth Circuit also does not disagree with the Tenth Circuit on the question presented, though it does add its own peculiar gloss that might eventually raise a conflict with some

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[8] The Second Circuit also noted that there was a complete lack of evidence that the plaintiff in *Lovejoy-Wilson* posed any threat or risk at all and that there was considerable evidence that she could perform her job safely. 263 F.3d at 220-21. The burden of proof in that case thus was wholly irrelevant to the outcome.

other case. In *Rizzo* v. *Children's World Learning Centers, Inc.*, 173 F.3d 254 (CA5 1999) (*Rizzo II*), *aff'd*, 213 F.3d 209 (CA5) (*en banc*) (*Rizzo III*), *cert. denied*, 531 U.S. 958 (2000), the Fifth Circuit considered a claim by a hearing impaired plaintiff who was reassigned from her job as a driver of a van transporting young children. The court expressly agreed with the Eleventh Circuit's *Moses* holding "that the burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or others." 173 F.3d at 259. On this point the Fifth Circuit likewise agrees with the Tenth Circuit below. The Fifth Circuit carved its own path, however, by shifting the burden of proof of direct threat back to the employer where the safety requirements "screen out or tend to screen out" the disabled. *Id.* at 259-60. While the court's reasoning on that point is somewhat suspect,[9] that additional gloss does not create a conflict with this case.

Petitioner here never challenged the safety requirement itself and never argued that it tended to screen out the disabled, hence that separate issue is not presented by the Petition. And while Petitioner now asserts that the Fifth Circuit's exception swallows the rule and effectively shifts the burden to defendants in *all* cases, Pet. 13-14 n. 6, that is merely the view of the *dissent* in *Rizzo II*, not the view of the Fifth Circuit. Because the putative safety standard in *Rizzo II* was narrowly defined as requiring the ability to discriminate spoken words, 173 F.3d at 259, and because plaintiff effectively refuted both the job-relatedness and business necessity of that narrow requirement through her years of safe driving, *id.* at 260, the

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[9] To defend a qualification standard that screens out the disabled, a defendant need only prove that it is job-related, consistent with business necessity, and not cured by a proffered reasonable accommodation. 42 U.S.C. § 12113(a). A defendant does not have the further burden of proving that plaintiff substantively fails the otherwise valid qualification standard, *i.e.*, that she poses a direct threat. *See infra* Part III.

Fifth Circuit's limited exception was highly fact-bound to say the least, and its precedential effect far from certain.

The questionable value of *Rizzo II* as conflicting precedent is corroborated by the *en banc* decision in *Rizzo III*. There the court acknowledged its uncertainty on the legal issue presented here and saved the question for another day. 213 F.3d at 213 n. 4. Interestingly, the *en banc* court acknowledged the EEOC's evolved position regarding the burden of proving direct threat; a position that precisely matches the position of the Tenth Circuit in this case. *Id.* Whatever the quirks of *Rizzo II*, therefore, on the question presented in this case it is in agreement with the Tenth Circuit and *Rizzo III* amply demonstrates that the full Fifth Circuit is still keeping an open mind on the issue. Such a potentially evolving legal rule does not require this Court's premature intervention.

The Ninth Circuit has not *squarely* addressed the question presented in this case, though in one case it did allocate the burden of proof to defendant in connection with an inherently dangerous job. In its earliest case on the issue, there was no inherent danger involved. *Nunes* v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243 (CA9 1999), involved the job of a cashier, and the employee suffered the disability of occasional fainting spells. There was no indication that the safety concerns were even remotely essential elements of such a standard job or that the job involved inherent risks of the sort present in the law enforcement or mass transit areas. Because the direct threat claim was not even remotely bound up in the essential functions of the job, it was not in that case tied to the plaintiff's ability to prove her qualification for the job. With the direct threat issue separated from the issue of qualification, the Ninth Circuit reached the same result that would be reached by the Tenth Circuit – it placed the burden of proof on the defendant.

An inherently dangerous job was at issue, however, in *Hutton* v. *Elf Atochem N. America, Inc.*, 273 F.3d 884 (CA9

2001). That case involved a chemical plant employee with diabetes that caused him to have blackouts and disorientation while on the job. In *Hutton*, however, the Court did not consider the discrete argument that the burden of proof is different for inherently dangerous jobs than it is for generally safe jobs, but rather simply relied on its decision in *Nunes* without addressing the distinction drawn by the Tenth Circuit below. *Id.* at 893. How the court would resolve that issue if squarely presented is unknown. Furthermore, in *Hutton* the burden of proof was completely irrelevant to the disposition given that the court affirmed summary judgment for *defendant* despite its allocation of the burden of proof. *Id.* at 895. Insofar as it addresses the question in this case *sub silencio* merely due to its factual context, that implied legal determination would be *dicta* and not binding on a subsequent panel of the Ninth Circuit. Such *dicta* is a thin predicate for a split.

The one court to reach a meaningful contrary conclusion on the narrow question presented here is the Seventh Circuit. In *Branham* v. *Snow*, 392 F.3d 896 (CA7 2004), the court addressed whether a diabetic IRS agent seeking to become a criminal investigator had raised a genuine issue of fact regarding whether he would pose a direct threat in such a job. While the court did state that the burden was on the IRS to demonstrate that the plaintiff would pose a direct threat, *id.* at 906-07, there are good reasons to discount the significance of that holding. For example, in discussing the evidence in the case the Seventh Circuit found that the plaintiff had proffered evidence, including medical opinion, that he could safely perform his duties and that defendant had not established otherwise. *Id.* at 905, 908-09. It thus reversed summary judgment for the defendant. In the face of direct evidence presented by the plaintiff on the direct threat issue, the allocation of the burden of proof had no impact on finding a genuine issue of material fact that precluded summary judgment.

Furthermore, the court's decision did not seem carefully to consider the distinct treatment of cases where direct threat

was part of the qualification rather than a defense unrelated to qualification. 392 F.3d at 906-07. Indeed, in describing the supposed dispute among the circuits, the Seventh Circuit conflated the separate issues of threats in the context of jobs with inherent safety components and jobs where the alleged safety concern is wholly incidental to the essential elements of the job. *Id.* at 906 n. 5 (mixing cases involving ordinary and hazardous jobs). That muddling of the issues further manifested itself in the court's refusal to revisit what it deemed established law of the circuit regarding the burden of proof. *Id.* Unfortunately that law was established in a different context not involving inherently dangerous jobs and hence did not really go to the distinction drawn by the Tenth Circuit.[10] How the Seventh Circuit would rule in a case where the distinction is clearly presented and considered is anybody's guess. While *Branham* thus may create a seeming split, it hardly represents a *settled* split.

Overall, the conflict alleged by Petitioner is at a minimum exaggerated and may well be illusory. Both the Seventh and Ninth Circuits seem to have overlooked the distinct issues raised by inherently dangerous jobs and simply applied existing precedent from cases that did not involve inherent dangers. Whether the Seventh or Ninth Circuits would maintain their positions in a case where the narrower question presented here was squarely litigated is unknown, and the apparent conflict could well resolve itself in future cases. Additional percolation of this issue thus could eliminate any seeming split or, at a minimum, could provide this Court additional and valuable analysis of the narrow question presented.

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[10] *Dadian* v. *Village of Wilmette*, 269 F.3d 831, 835, 841 (CA7 2001) (case involving housing discrimination based on denial of permission to make a curb-cut for a more handicapped-accessible driveway for plaintiff's home; fact that local ordinance allowed curb cuts where 50% of the houses on a block had such curb cuts shows that safety concerns were not an essential qualification for permission to make a cut where fewer than 50% of houses had such cuts).

III. THE DECISION BELOW IS ABSOLUTELY FAITHFUL TO THE ADA AND THIS COURT'S DECISIONS.

The decision below correctly recognized – and Petitioner stipulated – that law enforcement is an inherently hazardous occupation, posing dangers to the employee, her coworkers, and the public. And there is no dispute in this case that the ability to engage in law enforcement activities (including possession and handling of a firearm) safely and responsibly is an essential job qualification for a position with the Sheriff's Office. On its face it seems apparent that Petitioner cannot prove she is a qualified individual without proving her ability to perform her desired job safely and responsibly. *See Arline*, 480 U.S. at 287 n. 16 (person posing a health risk to coworkers not "otherwise qualified" for her job as required under Rehabilitation Act).

Petitioner's confusion on the burden of proof question, however, stems from the reference to the permissibility of a no-direct-threat qualification standard in a section relating to a *defense* to certain claims of discrimination. 42 U.S.C. § 12113. But when that section is read in its entirety and in the context of the specific type of discrimination to which it relates, it becomes plain that the "defense" at issue relates to the *validity* of any qualification standard, including one relating to direct threats, and does not suggest that the individual *satisfaction*, or lack thereof, of a valid qualification standard is likewise a defense rather than part of a plaintiff's *prima facie* burden of showing she is a qualified individual.

Discrimination under the ADA can be asserted in a variety of forms. The most obvious form is the simple refusal to hire a qualified individual based on her disability. 12 U.S.C. § 12112(a). But jobs of all sorts have various qualification standards through which they set out the essential elements of those jobs and the skills and abilities required for those jobs. Such qualification standards may require the ability to drive a truck (for a truck driver position), the ability to carry a fire-

hose while in full gear (for a fire-fighter position), the ability to speak a foreign language (for an interpreter position), or the ability to perform a hazardous activity safely and responsibly (for a police officer, an airline pilot, or a surgeon, for example). Whatever the qualification standard, if a disabled job applicant is unable to meet such standards, and hence unable to show that she is a qualified individual, she may still allege discrimination in the very existence of the standard itself. The ADA categorizes as a discrete form of discrimination

> using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity * * *.

42 U.S.C. § 12112(b)(6). Thus, if a qualification standard tends to screen out the disabled it may constitute discrimination in and of itself and hence potentially would be an invalid measure of whether an individual is qualified for a particular job. But this category of "discrimination" contains a built-in exception: Even a standard that tends to screen out the disabled will not be considered discriminatory, and hence will remain a valid measure of an individual's qualification for a job, if the standard "is shown to be job-related for the position in question and is consistent with business necessity."

It is to this discrete category of discrimination that the "defense" provision of § 12113(a) & (b) apply. Indeed, § 12113(a) basically restates the built in exception for job-related standards consistent with business necessity:

> It may be a defense to a charge of discrimination under this chapter that an alleged *application of qualification standards*, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to

> an individual with a disability *has been shown to be job-related and consistent with business necessity*, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(Emphasis added.) The subsequent reference to a "direct threat" in § 12113(b) merely confirms that it is generally permissible to include safety requirements as part of qualification standards: "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." That subsection does not create a separate defense for direct threats, but merely relates back to the job-relation/business-necessity defense for qualification standards in general. The only things a defendant may be required to prove as a defense are job relation, business necessity, and the potential negation of a proffered reasonable accommodation in lieu of the standard. (And even then such a defense is only necessary if the plaintiff demonstrates that the qualification standard tends to screen out the disabled.) Once the standard itself is successfully defended against a claim of discrimination, it simply becomes a valid measure of the necessary qualifications for a particular job, and hence part of the plaintiff's burden of proving that she is a qualified individual.

Where Petitioner goes awry in claiming that proof of a direct threat itself is an affirmative defense is in conflating the *validity* of the standard with its *satisfaction*. Nothing in § 12113 makes the satisfaction of a qualification standard an affirmative defense. To do so would completely invert the burden of proof on the plaintiff's *prima facie* case. Truck driver applicants would not have to prove that they are qualified to drive, fire-fighter applicants would not have to prove they are qualified to fight fires, and law enforcement applicants would not have to prove that they are capable of safely and responsibly being entrusted with weapons and the authority to use deadly force. Under such an erroneous interpreta-

tion a plaintiff's well-established obligation to prove that she is a qualified individual would become meaningless.

The necessary distinction between the validity and the satisfaction of qualification standards amply confirms the correctness of the decision below. There is no dispute that law enforcement is a hazardous occupation and that a qualification standard requiring the absence of a direct threat when performing law enforcement activities is both job-related and required by business necessity. Indeed, Petitioner does not suggest otherwise.[11] Likewise, there is no issue on appeal regarding any supposed reasonable accommodations that could supplant the basic safety and responsibility standard.

It is unsurprising that such issues are not in dispute; how could they be. Law enforcement officers are given extensive powers, including the power to use deadly force in many situations. With that power comes the responsibility to exercise it in a safe and responsible manner. Such safe and responsible conduct is at the very heart of the trust given to such officers and is critically necessary to the job of law enforcement personnel. It is, in short, an "essential function" of the job of a law enforcement officer. The direct-threat job qualification in this case thus does not constitute discrimination and is a valid measure of whether Petitioner is a qualified individual.

The only question that remains, therefore, is whether the Petitioner *satisfied* the direct-threat job qualification. That question is an essential element of Petitioner's case and hence was properly her burden to prove, as the Tenth Circuit correctly held.

Properly read, there is no tension whatsoever between the "defense" provisions of the ADA and the requirement that

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[11] Petitioner did not even argue that the standard itself was discriminatory in that it tends to screen out the disable, and hence the validity of the standard is not in question and a "defense" of the standard is not required.

plaintiffs demonstrate their satisfaction of valid qualification standards in order to prove they are qualified individuals. And for inherently dangerous jobs, it is a valid qualification standard to require that applicants not pose a direct threat to themselves or others in performing those jobs. Indeed, that is precisely the position taken by the EEOC and expressed to the *en banc* Fifth Circuit in *Rizzo III*. *See* 213 F.3d at 213 n. 4 ("The EEOC suggested at argument that where the essential job duties necessarily implicate the safety of others, the burden may be on the plaintiff to show that she can perform those functions without endangering others; but, where the alleged threat is not so closely tied to the employee's core job duties, the employer may bear the burden.").

The Tenth Circuit got it right, the legal issue is straightforward once properly articulated, and other circuits can be expected to reach the same result when the issue is squarely and effectively presented to them. There is simply no reason for this Court to expend its own resources addressing the question presented in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Peter Young
SCHWARTZ, BON, WALKER
& STUDER, LLC
141 South Center
Casper, WY 82601
(307) 235-6681

Erik S. Jaffe
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th St., N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Respondent

Dated: April 22, 2005